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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

ROBERT K. CORBIN
Attorney General of the
State of Arizona

JOHN L. JONES
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007

JOHN L. ENDICOTT
(Counsel of Record)
Special Assistant Attorney General
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

Attorneys for Petitioners

PANDICK PRESS, LOS ANGELES, 1945 S. FIGUEROA, LOS ANGELES, CALIFORNIA (213) 747-4321

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INTRODUCTION

Throughout their briefs, respondents and their amici contend that the instant case is controlled by the holding in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978). They claim that because petitioners "control" and "created" the deferred compensation plan, they should not be able to avoid liability simply because the life annuity benefits are provided by independent insurance companies. (R.B.[1] 25-27)

Respondents confuse the issue: Petitioners created the deferred compensation plan; they did not create or develop the challenged life annuities offered by the private insurance companies.

Although respondents complain that the actuarial tables upon which the life annuities are calculated are "based exclusively on the sex of the employee" and do not incorporate "bona fide mortality variables" (R.B. 3), petitioners were not responsible for those tables nor do they represent themselves as having any special expertise in the use of actuarial data. The only act for which petitioners can be held responsible is their act of offering their employees those life annuities made available by private insurance carriers in the open market. Since all insurance companies available to them used sex-based actuarial tables—and respondents, who carry the burden of proof, do not cite any evidence to the contrary—petitioners had no choice but to offer sex-based annuities if they were to offer annuities at all. Intentional discrimination cannot be premised upon a lack of choice.

Respondents' (and their amici's) argument should be seen for what it really is: An attempt at social engineering through the courts to change the presently legitimate use of sex by

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[1] Respondents' brief will be abbreviated as "R.B.," and Petitioners' brief will be abbreviated as "P.B."

private insurance companies as a basis for risk classification.[2] The fact that respondents disapprove of present insurance practices does not justify the invocation of Title VII to condemn an employer which only made available that which the private insurance market offered.[3]

I

PETITIONERS DID NOT DISCRIMINATE BECAUSE THEY HAD NO CHOICE BUT TO CONTRACT WITH INSURANCE CARRIERS USING SEX-BASED ACTUARIAL TABLES

Respondents have attempted to create the appearance of an issue of fact by contending that petitioners have misrepresented the meaning of the stipulation that "all [actuarial] tables presently in use provide a larger sum to a male than to a female of equal age. . . ." (J.A. 10.) Petitioners contend that the stipulation—which is unlimited in scope—meant, as it says, that "all tables presently in use" by insurance companies then available to Arizona made such a distinction; respondents contend that this stipulation meant only that the companies participating in the Arizona Deferred Compensation Plan used such tables.[4] However, this alleged issue of fact is really a red

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[2] This is made even more apparent by the fact that several amici briefs are dedicated to the issue of the propriety of the use of sex-based actuarial tables by the insurance industry. This is not a relevant issue under Title VII or in this case, and will not be addressed here.

[3] Title VII is not a proper means by which to challenge practices of the insurance industry since it does not govern relations between an insured and an insurer. *See Manhart*, 435 U.S. at 718 n.33. Instead, respondents' proper recourse was to file a complaint with the appropriate Insurance Commissioners, challenging those practices which they deemed illegal or inequitable.

[4] However, it was specifically stipulated two pages later in the Joint Stipulated Statement of Facts that "all of the companies participating in the State Deferred Compensation Plan used sex-segregated actuarial tables." (J.A. 12) There would have been no need to make the second stipulation if the first already covered that fact.

herring. Whether the stipulation is interpreted as contended by petitioners or as construed by respondents makes no real difference to the ultimate outcome of this case.

First, if petitioners' interpretation is correct and the parties did agree that all insurance companies offering life annuities used sex-segregated tables, then petitioners cannot have been guilty of discrimination. In that event, petitioners had no opportunity to act otherwise than they did, *i.e.*, to offer the sex-based annuities made available by the open market. It would obviously be illogical and unfair to conclude that petitioners' act of offering such annuities was "more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

Moreover, the absence of unisex annuities constitutes a "legitimate, nondiscriminatory reason" for petitioners' failure to include such an annuity in the options offered. This being so, respondents had the burden of proving "by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). Respondents did not make, and could not make, any such showing.

On the other hand, if the stipulation is interpreted as argued by respondents, *i.e.*, " [t]he record is silent as to the availability of nondiscriminatory plans" (R.B. 24), respondents failed to make out a prima facie case. This Court has made it very clear that the plaintiff in a Title VII case alleging discriminatory treatment has the burden of proving a prima facie

case of discrimination, as well as "[t]he ultimate burden of persuading the trier of fact that the defendants intentionally discriminated against the plaintiff." *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981). In order to make out a prima facie case, it was respondents' burden to prove that an insurance company which provided life annuities based on unisex mortality tables was available to the State of Arizona and this respondents utterly failed to do. In a typical case of disparate treatment, where the plaintiff contends that she has not been hired or promoted because of sex, the burden which plaintiff must meet has been stated by this Court as follows: "[t]he plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Texas Department of Community Affairs v. Burdine, supra,* 450 U.S. 248, 253; *accord, McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

Just as such a plaintiff must prove that the job was "available" before she can make out a prima facie case of discrimination in a typical case, so, too, respondent in this case had the burden of proving that a unisex annuity was "available" to Arizona which was not offered to her. If no job is available in a traditional case of discrimination, it cannot be inferred that plaintiff was discriminated against because she was not given a job. Similarly, if no unisex annuities were available to Arizona, it cannot be inferred that women were discriminated against by Arizona because it failed to offer such annuities. The record is completely devoid of any evidence that

such a unisex annuity was available.[5] Thus, respondent failed to satisfy her burden of proving a prima facie case.[6]

In any event, this alleged dispute as to the meaning of the stipulation is a diversion from the underlying fact that all insurers available to Arizona did in fact use sex-based tables. At the hearing on respondents' motion for summary judgment in the district court, respondents' counsel (then Mr. Meyerson)

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[5] The only purported evidence of unisex tables that respondents adduce —which is outside the record—is a recent adoption by the University of Minnesota of a unisex plan; however, this cannot disturb in any way the undisputed state of the record that there were no private insurance companies available to Arizona which offered unisex annuities in 1975 when respondent selected a life annuity option under the deferred compensation plan and her claim arose.

Likewise, the alleged evidence adduced by the amicus Lawyers' Committee for Civil Rights Under Law is irrelevant and misleading. They state that in a telephone call, Lincoln National Life Insurance Company stated that "in some cases" if the business was "large enough," it would be willing to provide group life annuities based on unisex tables. First, what Lincoln might do today is irrelevant to what was available to Arizona in 1975 when respondent's claim arose and she filed her charges with the EEOC. Second, the evidence is misleading since it presumably refers to a mandatory plan where members cannot withdraw because of dissatisfaction with unisex rates, unlike the instant plan. This affects the availability of unisex rates. Finally, this "evidence"—which is also outside the record—lacks foundation. The conditions and rates at which the insurance product would be offered are not mentioned. The fact that an insurer would offer a life insurance policy to an 80-year-old woman dying of cancer is meaningless without the price and conditions of the offer.

[6] Nor can respondents and their amici avoid their burden of proof by characterizing proof of the absence of unisex tables as an affirmative defense for which petitioners bear the burden of proof. (*See* Amicus Brief for the Lawyers' Committee for Civil Rights Under Law, p. 19.) *Burdine* establishes that the ultimate burden of proof remains with the plaintiff at all times. 450 U.S. at 253. After a plaintiff establishes a prima facie case, an employer only has a burden of production.

admitted that he was not aware of any carriers which would be prepared to offer a unisex table in Arizona:

> MR. MEYERSON: I do not know whether in the State of Arizona there is a carrier who is prepared to offer a plan that would be required if the Court would rule in favor of the plaintiff's motion.

October 22, 1979 Hearing, R. 11.

Moreover, the amicus brief of the American Council of Life Insurance (ACLI) states that it is "not aware of any private insurance company which offers an annuity plan which does not calculate benefits according to sex-specific mortality tables." (ACLI brief, p. 10, 24; *accord,* Amicus Brief of the Equal Employment Advisory Council, p. 2.) Further, in *Manhart* itself, an affidavit from an actuary was submitted which stated that "no tables have yet been developed which measure life expectancy for annuity purposes on a unisex basis." *EEOC v. Colby College,* 589 F.2d 1139 (1st Cir. 1978), quoting affidavit submitted in *Manhart.*[7]

Finally, respondents and their amici argue that there is no evidence "that this large employer, with 35,000 employees, could not have negotiated a contract with a company to use sex-neutral tables." (R.B. 8, 24; ACLU Brief, p. 13) The argument is misleading. First, respondents had no duty to attempt to change that which the marketplace offered. *See Harris v. McRae,* 448 U.S. 297, 316 (1980). Second, in 1978 (three years after respondent filed her claim) only 1,675 employees of the 35,000 state employees had elected to participate in the deferred compensation plan, and *only a portion of the 1675* chose the life annuity option (J.A. 6). Thus, the bargaining leverage is missing which respondents would seek to imply. Moreover, it was respondents' burden to prove that petitioners could have negotiated such a contract. *See Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. at 253. They did not meet that burden.

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[7] Even the Equal Employment Opportunity Commission, which submitted a brief to the Ninth Circuit, appeared to concede the absence of any private insurance companies which used unisex mortality tables in Arizona. (EEOC Brief, p. 14.)

II

PETITIONERS CANNOT BE HELD LIABLE FOR DISCRIMINATORY TREATMENT UNDER TITLE VII WHERE THERE IS A FINDING THAT PETITIONERS DID NOT INTEND TO DISCRIMINATE

In their opening brief, petitioners established that where an employee alleges less favorable treatment on the basis of sex under Title VII, proof of discriminatory motive is critical. Accordingly, the court of appeals was incorrect in concluding that proof of intent was unnecessary. (P.B. 23-28) Petitioners are not liable under Title VII in this case because the district court made an express finding that petitioners did not engage in purposeful discrimination.

Respondents claim that petitioners' argument is premised upon "a fundamental misunderstanding." (R.B. p. 18) Respondents state that the district court's determination that petitioners did not engage in purposeful discrimination cannot be elevated to a finding of fact because it was made "in the context of its understanding of the equal protection clause of the fourteenth amendment and not with regard to Title VII legal standards." (R.B. 19 n.13; *see also* ACLU Brief, p. 25.) However, the standard of proof under the Equal Protection Clause of the Fourteenth Amendment and for disparate treatment under Title VII is the same. *See Teamsters v. United States,* 431 U.S. 324, 335-336 n.15 (1977). It is where the disparate impact test under Title VII is at issue that the standard of proof under the Fourteenth Amendment differs from Title VII. *Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252, 265 (1977); *see Washington v. Davis,* 426 U.S. 229 (1976).[8]

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[8] Respondents also claim that the district court's finding that petitioners did not engage in purposeful discrimination should be considered a conclusion of law and not one of fact on the ground that the stipulated facts are

(Footnote continued on next page)

Respondents further claim that the only discriminatory intent needed under Title VII is "knowingly treating all women differently." (R.B. 19, 20) However, Arizona did not treat women differently. Nor is its awareness or knowledge of the consequences of the insurers' practices tantamount to its intent to treat them differently. *See Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279 (1979). This Court has consistently held that in disparate treatment cases[9], the employer must be found to have *intentionally* discriminated, *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), and that the "central focus of inquiry" must be whether the employer is treating some people less favorably than others "because of" their sex. *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, *quoting Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977).

As this Court stated in *Personnel Administrator of Mass. v. Feeney,* 422 U.S. 256 (1979):

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of the consequences. [Citation omitted.] It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

(Footnote continued from previous page)
silent as to the state of mind of the employer. To the contrary, the district court was entitled to infer the lack of intent from the record, *see Arlington Heights v. Metropolitan Housing Corp., supra,* 429 U.S. at 265-266, and indeed so stated: "From the facts agreed upon, it is clear that this classification was not made by the defendants but rather are the results of the insurers' judgment. This is somewhat less than the purposeful and invidious gender-based discrimination necessary for a finding that the compensation plan violates . . . the Fourteenth Amendment." 486 F. Supp. 645, 651. (See April 14, 1980 Hearing. R. 8) Respondents have not challenged this finding on appeal.

[9] Respondents in their brief have agreed this is a disparate treatment case. (R.B. p. 18-24).

Personnel Administrator of Mass. v. Feeney, id., 442 U.S. at 279.[10]

Hence, the critical issue is whether Arizona selected life annuities "because of" an illegitimate consideration, such as sex, *Furnco Construction Corp. v. Waters, supra*, 438 U.S. at 577, and not simply whether it was aware of the consequences of the insurers' practices. Here, Arizona offered life annuities which used sex-based tables because they were the only annuities available to it at the time, not because the annuities were based on sex-distinct actuarial tables. Indeed, even if a unisex annuity had been available to Arizona at the time respondent brought her claim, Arizona would still have had an opportunity under Title VII to "articulate" a nondiscriminatory reason why it did not select that annuity before a court could conclude that Arizona offered only sex-based annuities "because of" the effect on females.

Respondents also claim that petitioners' position on intent is incorrect because "[t]his Court has never imposed a requirement that an employee or applicant show *why* the employer engaged in a practice of using racial or sexual criteria." (R.B. 21) Petitioners agree that the issue is not "why", but "whether" the employer used racial or sexual criteria in the challenged practice. However, knowledge that a third party engages in a practice based on an employee's race or sex does not mean that

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[10] Respondents claim that *Feeney* is not relevant to the issue of intent because it involved a facially neutral policy which was challenged under the Fourteenth Amendment, not Title VII. (R.B. 22 n.15) However, petitioners have only cited *Feeney* as authority for the meaning of discriminatory intent which, as demonstrated earlier, is the same element of proof necessary to prove disparate treatment under Title VII. *Compare Teamsters v. United States, supra*, 431 U.S. 324, 335-336 n.15, *with Arlington Heights v. Metropolitan Housing Corp., supra*, 429 U.S. 252, 265-266. Furthermore, this Court has ruled that the concept of discrimination which has evolved from court decisions involving the Equal Protection Clause of the Fourteenth Amendment is a "useful starting point" for purposes of interpreting the term "discrimination" under Title VII. *General Electric Co. v. Gilbert, supra*, 429 U.S. 125, 133.

the *employer* is treating that employee differently because of her race or sex.[11]

Respondents also claim that they have carried their burden of proof of discriminatory intent because the employer has the burden of articulating a legitimate, non-discriminatory reason for its action and "[t]he record in this case contains no evidence of any lawful reason for using sex-segregated tables, nor could any legitimate reason be articulated under this Court's decision in *Manhart* and this plan." (R.B. 22) However, respondents confuse the issue: Arizona does not "use" sex-based tables. The insurers do that; Arizona only *offers* life annuities which the insurers base upon such tables. Since the insurance carriers have not been sued, the record obviously would not "contain evidence of any lawful reason" for the use of sex-based tables by the carriers. If respondents meant to contend that no lawful reason exists for Arizona's offering annuities which are based on sex-based actuarial tables, they are quite mistaken. To the contrary, the record expressly provides that all actuarial tables in use are sex-based and therefore Arizona had no choice but to offer sex-based life annuities if it was to offer them at all. The lack of choice in the marketplace is certainly a lawful reason for not offering that which does not exist.

Respondents claim that the effect of petitioners' position on Title VII could be "profound" because it would allow employers to "contract out for various services relating to terms and conditions of employment and then claim that they did not 'intend' the discriminatory programs which they knowingly and

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[11] The ACLU misstates petitioners' position on intent and claims that petitioners' position is that they should not be held to have intended to discriminate if their motives were benign. (ACLU's Brief, p. 24) That is not petitioners' position. Petitioners' position is that intent to discriminate requires that *an employer* take an action, whether that act is done for malign or benign reasons, "because of" an employee's gender. Here, Arizona contracted with private insurance companies "because" it wanted to offer life annuities, not "because" the life annuities were based on sex-distinct actuarial tables.

expressly adopted." (R.B. 23) This contention is specious. If non-discriminatory services are available, it can be inferred that the employer intended to treat its female employees differently by its failure to offer them—unless the employer can articulate a non-discriminatory reason for its choice and the plaintiff cannot prove that the reason is a pretext. *See McDonnell Douglas Corp. v. Green, supra,* 411 U.S. 792, 804. However, where an employer contracts for a service and can receive no better benefits for females because the open market does not furnish them, it clearly does not intend to treat them differently. *See General Electric Co. v. Gilbert, supra,* 429 U.S. at 139 n.17. For this reason, all of the analogies cited by the ACLU at pages 14-15 of its amicus brief are flawed, if not sophistic.[12]

Respondents also argue that where "an employer explicitly and knowingly approves sex-based differentiation developed by a third-party contractor, petitioners' theory would permit an employer to escape liability." (R.B. 23) Again, the petitioners did not approve, either knowingly or explicitly, of the use of sex-based tables by the insurance companies and indeed do not

[12] The ACLU claims that this action is analogous to a case where an employer offers a form of guaranteed mortgage financing to senior employees through a specified local bank and then seeks to avoid responsibility under Title VII for the bank's discriminatory refusal to lend money to black or women employees on the grounds that it was a third-party decision. However, there, the employer's purposeful *choice* of a bank with discriminatory policies would constitute treating black or women employees differently because banks with nondiscriminatory lending policies were available to it on the open market. Likewise, the ACLU's argument that an employer offering membership in an employer-selected eating club could not defend itself against a charge of violating Title VII by arguing that the refusal of the club to admit black or women employees was a third-party decision is not apposite. There, again, if the employer did not offer membership in other clubs available on the open market which treated employees equally, its intentional choice of a club which it knew treated women or blacks differently, would amount to a purposeful act to treat employees differently on the basis of race or sex. However, where an employer provides what is available to it on the open market (or at least what it knows to be available), it cannot be properly accused of intending to treat them differently on the basis of race or sex since it had no other choice.

consider themselves qualified to render an opinion as to the advantages and disadvantages of sex as a classification in actuarial tables. Petitioners' position is simply that where they had no choice but to offer annuities based on sex-based tables, they cannot be held to have intended to treat women differently. Intentional discrimination cannot be premised upon a lack of choice.

III

UNDER THE REASONING OF THIS COURT'S DECISION IN *MANHART*, PETITIONERS ARE NOT LIABLE UNDER TITLE VII

A. Title VII Relates To The Conduct Of An Employer, Not Third Parties.

Respondents argue that "here, as in *Manhart*, there is gender-based discrimination in the use of sex-segregated actuarial tables." (R.B. 27) Such an argument glides over the issue of *who* is responsible for the use of the sex-based actuarial tables. This Court noted in *Manhart* that Title VII governs the conduct between an employer and its employees, not between third parties and the employees, unless the third parties can be considered the employer's agents or corporate shells. 435 U.S. at 718 n.33[13] Arizona, unlike the employer in *Manhart*, can only be held responsible for making available life annuities, but not for using sex-based tables.[14]

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[13] The insurers cannot be considered Arizona's agents or corporate shells. (*See* P.B. 12.)

[14] Accordingly, respondents are incorrect when they contend that in *Manhart*, "this Court held that retirement or pension plans which classify women on the basis of sex rather than individual characteristics are illegal under Title VII . . ." (R.B. 8) This overlooks the fact that in *Manhart* this Court did not broadly condemn all such retirement and pension plans but expressly limited its holding to employer-operated plans: "[a]ll that is at issue today is a requirement that men and women make unequal contributions to an *employer-operated* pension fund." [Emphasis added] 435 U.S. 702, 717. This is a sensible limitation since Title VII prohibits only employers, not third parties from discrimination. 42 U.S.C. §2000e-2(a)(1).

Implicitly recognizing that they cannot hold Arizona liable for the conduct of the insurance carriers, respondents argue that "the employer created a discriminatory program," and that "the employer concedes that the plan classifies on the basis of sex." (R.B. 9, 21) However, the plan itself is sex-neutral and non-discriminatory. It is the actuarial tables, which petitioners did not control or develop, of which respondents complain.

Nonetheless, respondents argue that because the employer's control over the plan is "extensive," it is also responsible for the insurance carriers' use and development of the actuarial tables. Respondents cite as evidence of the employer's control that the "deferred employee funds remain assets of the employer until payment," that they are "subject to the claims of the employer's general creditors," that "[t]he employer retains complete legal title" to the funds, and that the "employees have only a future, contingent legal claim for payment." (R.B. 5, 25)

However, this control is unrelated to the development of the life annuities or the use of the sex-based actuarial tables, of which respondents complain. Indeed, it is only when the *employee* acquires an absolute right to payment that the use of sex-based tables comes into being. Further, Arizona's limited control over the funds (which are placed into the investment of the employee's choice) is necessary in order for the plan to obtain the desired tax deferral. *See* 26 U.S.C. § 457(b)(6). To qualify, a deferred compensation plan must provide that all amounts of compensation deferred under it and all income attributable to it will remain solely the property and right of the State, subject only to the claims of the State's general creditors. 26 U.S.C. § 457(b)(6). However, this control does not relate or reach to the insurance companies' use of sex-based actuarial tables for life annuities.

Respondents next argue that petitioners are responsible for the insurance carriers' use of the actuarial tables because "the state procurement documents requesting contract bids expressly

solicit a breakdown of annuity payments by sex," and in a *non sequitur* contend that "the employer here has foreclosed the development of a non-discriminatory annuity plan for its employees through the use of the contract procurement documents that solicit contract bids from private insurance companies solely on the basis of the sex of the employee." (R.B. 24, 26)

Respondents' evidence of "solicitation" (R.B. 3) consists of an innocuous inquiry to insurance companies as to what type of monthly annuity the bidding insurance companies would provide for both a male and a female, age 65, under various circumstances. This inquiry cannot in any way be construed as "encouragement" of any form of actuarial table or "foreclosure" of the development of unisex tables. A bidding company could have fully complied with the request by providing a unisex rate. Arizona simply sought information concerning benefits for both males and females to determine which insurers provided the most lucrative benefits for all concerned, and would have been derelict in its duty to do otherwise.

Accordingly, Arizona is not responsible for the use of sex-based actuarial tables by the independent insurance carriers. Since the independent insurance carriers' use of such tables for life annuities is not prohibited by Title VII or elsewhere, the fact that an employer has made them available to its employees cannot transform a legitimate practice into a prohibited one. Neither *Manhart* nor common sense holds that offering an employee the opportunity to deal with a third party is "discriminating against" an employee.[15]

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[15] The ACLU argues that Arizona's "affirmative active participation" in adopting the plan "constitutes involvement sufficient to hold it responsible under Title VII," citing *Spirt v. TIAA-CREF*, 691 F.2d 1054 (2nd Cir. 1982), *cert. pet. filed*, Docket No. 82-791 (Nov. 9, 1982); *EEOC v. Colby College*, 589 F.2d 1139, 1141 (1st Cir. 1978); *Sobel v. Yeshiva University*, 477 F.Supp. 1161, 1166 n. 4 (S.D.N.Y. 1979); and *Peters v. Wayne State University*, 691 F.2d 235, 238 (6th Cir. 1982) *cert. pet. filed*, Docket No. 82-794 (Nov. 10, 1982). None of these cases held employers responsible simply because they contracted with private, independent insurance companies. In

(Footnote continued on next page)

B. The Instant Plan Falls Squarely Within The Open Market Exception Stated in *Manhart* And Is Therefore Lawful.

Respondents argue that petitioners' reliance on the *Manhart* open market exception is flawed for several reasons. First, respondents claim that *Manhart* did not create an open market exception. (R.B. 29) Respondents state that the open market exception only means that "Title VII does not regulate transactions in the open market outside of the employer-employee context." (R.B. 29)

Respondents' construction of the open market exception is so narrow as to be tautological: Of course, Title VII does not regulate transactions "outside of the employer—employee context." Petitioners submit that the open market exception is premised on the fact that Title VII applies only to the actions of an employer, not to third parties in the marketplace. A long line of authority indicates that an employer's liability does not extend to conditions of the marketplace which it did not create. *See Harris v. McRae*, 448 U.S. 297 (1980); *General Electric Co. v. Gilbert*, 429 U.S. 125, 139 (1976); *Briggs v. City of Madison*, 536 F. Supp. 435, 447 (W.D. Wisc. 1982); *Barone v. Hackett*, 28 FEP Cases 1765 (D.R.I. 1982). (See P.B. 17-23.)[18]

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Sobel, the district court simply concluded that the action could not be decided on summary judgment and in dictum indicated that *Manhart's* prohibition against unequal contributions to an employer-operated plan did not control the case because of the "difficulty in applying the legalistic rationale of *Manhart* to a pension plan which is funded through a private insurance company." 477 F. Supp. at 1166. The other cases involve TIAA and CREF which were found to "exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees." *Spirt v. Teachers Insurance and Annuity Association, supra*, 691 F.2d at 1063. In *EEOC v. Colby College*, the court of appeals simply vacated the district court's dismissal of the complaint and stated that "we do not rule that *Manhart* requires a ruling on liability . . . ." 589 F.2d at 1146. The court in *Peters* found the employer not liable under Title VII.

[18] Respondents claim that "the employer asks this Court to exempt discriminatory employment practices because such discrimination derives from practices in the marketplace that are not initially related to the

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Respondents' second argument against the open market exception is that nothing in the record shows that sex-neutral tables were unavailable. (R.B. 29) That has already been addressed in section I. In any event, respondents had the burden to prove the availability of unisex annuities, and cannot shift the burden to petitioners. *See Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. at 253.

Moreover, it appears that even if unisex life annuities had been available in the marketplace in 1975 and petitioners had offered them, along with all of the other offerings of the open market, respondents would still complain of a violation of Title VII. Respondents argue that "Title VII prohibits an employer from offering a discriminatory fringe benefit regardless of whether the employer also offers nondiscriminatory alternatives." (R.B. 9) Hence, respondents' real complaint is not that petitioners failed to offer unisex annuities but that they did offer sex-based annuities, i.e., they offered what was available on the open market and that paid more per month to males than to females. Accordingly, respondents are really attacking the open market. Under respondents' theory (as well as that of the Ninth Circuit, *see* 671 F.2d at 335), the availability of unisex annuities is simply irrelevant.

Respondents' third argument is that "Title VII does not allow an employer to avoid statutory responsibility by contracting out." (R.B. 29) Respondents do not cite any authority for this proposition and also misstate the issue. This case is not one of an employer who *intends* to discriminate and decides to contract out the responsibility, but a case in which an employer did not intend to discriminate but intended to make available to all employees a benefit (life annuities) and offered the only

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employment context." Respondents misstate petitioners' position. It is not that discrimination "derives" from the marketplace, but that an employer is not responsible for conditions in the marketplace which it did not create and over which it had no control. Respondents' attempt to distinguish *Harris v. McRae* (R.B. 26-27) was anticipated by petitioners and fully rebutted in the opening brief at page 19 n.11.

type available on the open market. Despite respondents' protests, they never indicate (nor could they) that an insurer was available to Arizona in 1975 which used sex-neutral tables.

Finally, respondents complain that the insurance companies with which petitioners contracted do not mirror the open market because Arizona did not contract with *all* of the companies on the open market or provide *all* of the possibilities available to it. It is not so important to mirror the open market as to represent it. ***The material fact is that respondents did not prove that they could have done better on the open market than with the companies which petitioners offered.***

Petitioners have done no less than required by this Court in *Manhart* to qualify for the open market exception: Petitioners set aside equal contributions for similarly situated employees, and each retiree was able to purchase the largest benefit which the open market offered—whether the employee chose to do that through the lump sum offered by Arizona or through the available insurance companies which provided the largest benefits available in the open market.

C. Unlike *Manhart*, In The Instant Case Contributions Are Equal.

Respondents incorrectly state that "petitioners in this case implicitly recognize" that the fact that *Manhart* involved unequal contributions while the instant case involves unequal benefits "is of no decisional consequence." (R.B. 13-14) Petitioners submit that there is a material distinction between unequal monthly *contributions*, as in *Manhart*, and unequal monthly *benefits*, as here.

Where a woman is required to make a higher monthly contribution than a man, both her *monthly* contributions and her *total* contributions over the term of her employment will be higher; hence, her aggregate and monthly salaries are always less than those of a comparable male. In contrast, where a woman receives lower monthly benefits (but contributions are

equal as here), whether her *total* retirement benefits will be more or less than those of a comparable man depends upon her longevity; only her monthly payments will always be less than that of a man because in the experience and judgment of the annuity insurer she is expected to receive such benefits for a longer period of time.[17] Since the purpose of a deferred compensation plan is to defer current income and to recoup it at a later date when the tax consequences will presumably be lighter, whether a female or male will recoup all of their deferred compensation will depend solely on their longevity, not their sex.

In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), this Court held that General Electric's disability benefit plan (which excluded pregnancy) did not involve discrimination based upon gender because the plan instead divided potential recipients into two other groups: pregnant women and non-pregnant persons. 429 U.S. at 135. Similarly, in this case, the plan divides potential recipients into three different groups, not on the basis of sex, but: (1) persons who will recoup less income than they deferred into the plan, (2) persons who will recoup the amount of income which they deferred, and (3) persons who will recoup more income than they deferred. Each of these groups will be composed of both men and women, and whether any given person will fall into any particular group will be determined on the basis of his or her longevity. Therefore, the amount of retirement income received by each employee is not based on gender as such.

In *Manhart*, this Court rejected the argument that the different contributions exacted from men and women were based on the factor of longevity, rather than sex, because all

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[17] For this reason, it is misleading to compare the monthly benefits of males and females rather than total retirement income. An employee who selects a life annuity has chosen a product which pays a certain monthly amount, not for a fixed period but for life (an indefinite period of time). A male will receive x amount for his expected life (y), while a woman will receive u amount for her expected life (v). Although $x \times y$ has the same value as $u \times v$, comparison between x and u is meaningless where y differs from v.

women took home less pay and the determination of who would make a higher contribution was ultimately based on sex. All women were treated differently, i.e., were required to make greater contributions than men, regardless of longevity. However, in the instant case, women do not contribute more than similarly situated men, and whether any given employee will receive more or less *total* retirement income than he or she contributes cannot be determined on the basis of sex. Unlike *Manhart*, where all women were required to contribute more, in this case whether a woman will recover more income than a similarly situated male depends solely on her longevity.[18]

Accordingly, the ultimate receipt of retirement benefits over an employee's lifetime will depend upon his or her longevity, unlike *Manhart* where the receipt of less take-home salary always depended solely on one's sex. Petitioners submit that there is thus a material distinction between unequal contributions and unequal benefits, at least where a deferred compensation plan is involved.[19]

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[18] Indeed, the appendix to the amicus brief of the American Council of Life Insurance evinces that females, on the average, will recoup approximately ten percent more in aggregate annuity benefits than similarly situated males.

[19] In *Peters v. Wayne State University*, 691 F.2d 235 (6th Cir. 1982), the Sixth Circuit held that the payment of unequal monthly pension benefits did not violate Title VII because, *inter alia*, the actuarial value of the fund for similarly situated male and female employees was equal. Accordingly, the court held that the plan differentiated between men and women on the basis of longevity. The other lower courts which have rejected the distinction between plans providing for unequal contributions and unequal monthly benefits have done so without much discussion. *E.g., Spirt v. Teachers Insurance and Annuity Association, supra; Retired Public Employees Association of California v. California*, 677 F.2d 733, 735 (9th Cir. 1982); *EEOC v. Colby College*, 589 F.2d 1139, 1144 (1st Cir. 1978).

CONCLUSION

For all the foregoing reasons, petitioners request that this Court reverse the judgment of the Court of Appeals and order that judgment be entered in their favor.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General of the
State of Arizona

JOHN L. JONES
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007

JOHN L. ENDICOTT
(Counsel of Record)
Special Assistant Attorney General
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

Attorneys for Petitioners